FILED
NOV 22 1988
JOSEPH E. SPANIOL, JR.
CLERK

No. 88-630

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF ALABAMA,
Petitioner,

vs.

BENJAMIN F. COX, and
BENNIE J. HAYS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

BRIEF OF AMICI CURIAE

State of Missouri, Joined by the States of Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

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QUESTIONS PRESENTED

1. Does the Equal Protection Clause prohibit white defendants charged with murdering a black person from using a state system of peremptory challenges to exclude black veniremembers from the jury solely because of their race?

2. Should the requirements and guidelines of *Batson v. Kentucky*, 476 U.S. 79 (1986), be extended to the use of peremptory challenges by defense counsel representing white defendants charged with crimes against black victims?

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INTEREST OF THE AMICI CURIAE

The states listed in Appendix B, by and through their respective Attorneys General, respectfully offer this brief as *amici curiae* in support of the position of the petitioner in this cause. All of the states joining in this brief have laws or rules of court providing for peremptory challenges. It is extremely difficult, however, for states to effectively present the issue of racially discriminatory peremptory challenges on the part of defense attorneys. As a result, defense attorneys, seeking every advantage, are free to remove minorities from juries for racially discriminatory purposes.

The precise issue raised in the present cause either has arisen or may arise in all of these states. For this reason, the *amici* have a substantial and continuing interest in cases such as the one at bar.

SUMMARY OF ARGUMENT

Defense counsels' use of peremptory challenges for racially discriminatory purposes violates the Fourteenth Amendment Equal Protection Clause. Courts cannot swear in jurors chosen on the basis of a racially discriminatory purpose without violating the Equal Protection Clause. The *prima facie* case guidelines of *Batson v. Kentucky*, 476 U.S. 79 (1986) should be applied to defense challenges as well as to those by prosecutors.

ARGUMENT

It is the position of the *amici curiae* that the United States Constitution forbids defense attorneys as well as prosecutors from exercising peremptory challenges for racially discriminatory purposes. *Prima facie* case guidelines should apply to both parties to the litigation.

I. Introduction

In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 1718 n. 12, 90 L.Ed.2d 69 (1986), this Court left open the question, "whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." Given that defense counsel in the case at bar struck all blacks from the venire on the *assumption* that blacks could not be fair and impartial, the time to address the issue is at hand. Courts should not countenance purposeful racial discrimination in the selection of jurors by prosecutors or defense attorneys. Because the matter is of great concern to those responsible for prosecuting criminal offenses, *amici curiae*, each of whom has provided for the exercise of peremptory challenges,[1] respectfully submit the following discussion in support of the State of Alabama's petition for writ of certiorari to the Alabama Court of Criminal Appeals.

II. Applicability of the Equal Protection Clause

A prosecutor's use of peremptory challenges for racially discriminatory purposes violates the Equal Protection Clause of the Fourteenth Amendment. *Batson v.*

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1. *See* Appendix A.

Kentucky, supra. In *Batson* the Court continued its efforts, dating back to *Strauder v. West Virginia,* 100 U.S. (10 Otto) 303 (1880), to ensure that no citizen is denied access to one of society's most important institutions, the jury, solely on the basis of race. The Court held in *Strauder* that a state statute limiting qualification of jurors to white citizens violated the Equal Protection Clause. *Id.* at 310. As the Court pointed out,

> It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice, a right, a legal right, under the constitutional amendment?

Id. at 309.

The process continued in *Swain v. Alabama,* 380 U.S. 202 (1965). In *Swain,* the Court reiterated its position that "deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." *Id.* at 204. In applying the rule specifically to the petit jury, the Court held that "the defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time." *Id.* at 227. Not surprisingly, the defendant in *Swain* was unable to carry that burden. *Id.* at 226.

Finally, in *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 1714, 90 L.Ed.2d 69 (1986), the Court was called upon "to reexamine that portion of *Swain v. Alabama* . . .

concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." Noting that some interpretations of *Swain* "placed on defendants a crippling burden of proof," *Id.* 106 S.Ct. at 1720, the *Batson* Court held "that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." *Id.* at 1722-23. Further, Title VII[2] *prima facie* case guidelines provide the evidentiary tools for discerning the existence of purposeful racial discrimination. *Id.* at 1721 n. 18, 1722 n. 19, 1723.

Attention to the scope of *Batson* is essential to a just resolution of the issues presented in the case at bar. Although, as noted above, the *Batson* majority "express[ed] no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel," *id.* at 1718 n. 12, the Court's discussion of the harm resulting from purposeful racial discrimination in the selection of jurors applies equally to defense counsel:

> Competence to serve as juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at trial . . . A person's race simply "is unrelated to his fitness as a juror". . . The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch upon the entire community. Selection procedures that purpose-

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2. Title VII of the Civil Rights Act of 1964, Section 701 et seq., 42 U.S.C.A. Section 2000e et seq.

> fully exclude black persons from juries undermine public confidence in the fairness of our system of justice. . . Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black] citizens that equal justice which the law aims to secure to all others."

Id. at 1717-18.

Can it truthfully be said that the precise situation will not prevail if defense attorneys exercise their peremptory challenges for racially discriminatory purposes? How then does one explain to an excluded juror that his or her race precludes fair and impartial judgment where defendants are concerned? The very thought is repugnant.

III. Equal Protection Clause Analysis

In order for a violation of the Fourteenth Amendment to occur, there must be some form of State action. *Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922, 924 (1982). State action is clearly present when a defense attorney exercises peremptory challenges. Most obviously, a court cannot swear in a panel of jurors, chosen for racially discriminatory purposes, without placing an official stamp of approval on the underlying motive. That was the thrust of the Court's ruling in *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948), where the Court confronted "cases in which the States have made available to . . . individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of . . . rights. . ." The Court held that "in granting judicial enforcement of . . . [racially] restrictive agreements

in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand." *Id.* at 20.

In reaching its conclusion, the Court in *Shelley* drew upon cases decided in the same term as *Strauder v. West Virginia, supra,* holding that "a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the [Fourteenth] [A]mendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another." *Shelley v. Kraemer, supra* at 14, quoting *Commonwealth of Virginia v. Rives,* 100 U.S. (10 Otto) 313, 318 (1880). Therefore, "the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment." *Shelley v. Kraemer, supra* at 14.

The foregoing discussion yields the necessary conclusion that a New York court erred in finding no state action in a defense attorney's exercise of peremptory challenges. *See Holtzman v. Supreme Court, Kings County,* 526 N.Y.S.2d 892 (Sup. 1988). In *Holtzman,* the Supreme Court of Westchester County, New York, relied upon *Polk County v. Dodson,* 454 U.S. 312 (1981) in support of its ruling that defense attorneys cannot be "state actors." *Holtzman v. Supreme Court, Kings County, supra* at 898. First, the issue is not so much whether a defense attorney is a "state actor," but whether the *courts* may enforce racially discriminatory peremptory challenges without violating the Equal Protection Clause. *Shelley v. Kraemer, supra.* Second, it is important to note that *Polk County* merely addressed a defense attorney's role as "personal counselor and advocate." *Polk County v.*

Dodson, supra at 318. That role must be distinguished from the issue presented in the instant case because, as another New York court has observed,

> the State is not merely an observer of the discrimination, but a significant participant. It supplies the tools (peremptory challenges), the place (courtroom), the object (juror), the setting (criminal action), and enforces the discrimination (discharge of juror). The only thing the State does not do is make the decision to discriminate.

People v. Gary M., 526 N.Y.S.2d 986, 994 (Sup. 1988). The latter case is far more in keeping with the letter and spirit of the Equal Protection Clause, and the line of cases from *Strauder* to *Batson*, than is *Holtzman*. Surely one will not be heard to argue that purposeful racial discrimination is necessary to one's role as "personal counselor and advocate." Thus, it cannot be denied that in allowing purposeful racial discrimination in the selection of jurors, "the States have made available to . . . individuals the full coercive power of government to deny to [jurors], on the grounds of race or color, the enjoyment of [the equal protection of laws]. *Shelley v. Kraemer, supra* at 20. Purposeful racial discrimination on the part of defense attorneys in exercising peremptory challenges cannot withstand scrutiny under the Equal Protection Clause.

IV. Prosecutor's Standing to Raise the Equal Protection Clause Issue

The *amici* are aware that the general rule is that "one may not claim standing . . . to vindicate the constitutional rights of some third party." *Barrows v. Jack-*

son, 346 U.S. 249, 255 (1953). However, the general rule is not applied where one's rights "could not be effectively vindicated except through an appropriate representative before the Court." *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958). To require the excluded jurors to bring separate lawsuits, in similar fashion to *Carter v. Jury Commission*, 396 U.S. 320 (1970), would be to place the same "crippling burden" upon jurors as the *Batson* Court found with respect to defendants as a result of *Swain v. Alabama*, *supra*. The best, most efficient place to remedy purposeful racial discrimination is right on the spot.

Granting third party standing is therefore essential in order to vindicate the equal protection rights of excluded jurors. *See* Note, "Discrimination by the Defense: Peremptory Challenges After *Batson v. Kentucky*," 88 Colum.L.Rev. 355, 358 (1988). Moreover, *Batson* implicitly granted to defendants third party standing to vindicate the rights of jurors improperly challenged by prosecutors. Considerations of fairness to jurors and judicial economy require granting third party standing to prosecutors as well. Both sides can be counted on to be effective advocates for the excluded jurors because both sides will have an extremely important "relationship between one who act[s] to protect the rights of a minority and the minority itself." *Eisenstadt v. Baird*, 405 U.S. 438, 445 (1972). Indeed, the adversarial setting assures effective advocacy.

V. Applying the Prima Facie Case Guidelines to Defense Challenges

As far as procedure is concerned, there is no reason why the Title VII *prima facie* case guidelines, applied

in *Batson* to prosecutors' peremptory challenges, *Batson v. Kentucky, supra,* 106 S.Ct. at 1721 n. 18, 1722 n. 19, 1723, should not apply to defense challenges as well. Because the *prima facie* case guidelines are merely evidentiary tools, there is no constitutional impediment to applying them equally to defense attorneys. Further, courts and attorneys are by now acquainted with *prima facie* case determinations of purposeful racial discrimination under *Batson.* There is no need to apply a different methodology for defense challenges when the goal is precisely the same as for prosecutors.

VI. CONCLUSION

Prior to *Batson,* several states had adopted the position that a defendant's use of peremptory challenges in a racially discriminatory manner is impermissible. *See State v. Neil,* 457 So.2d 481, 487 (Fla. 1984); *Commonwealth v. Soares,* 377 Mass. 461, 387 N.E.2d 499, 517 n. 35 (1979), *cert. denied,* 444 U.S. 881 (1979), citing *Singer v. United States,* 380 U.S. 24, 36, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965); *Commonwealth v. Reid,* 384 Mass. 247, 424 N.E.2d 495, 499 (1981). *See also, Booker v. Jabe,* 775 F.2d 762 (6th Cir. 1985), on remand 801 F.2d 871 (1986), *cert. denied,* 107 S.Ct. 910 (1987). As courts become more familiar with the *Batson* requirements for prosecutors, they are more aware of its implications for defense challenges. *See State v. Alvarado,* 221 N.J.Super. 324, 534 A.2d 440 (1987); *Chew v. State,* 71 Md.App. 681, 527 A.2d 332 (Md. App.), *cert. granted,* 311 Md. 301, 534 A.2d 369 (1987); *People v. Muriale,* 526 N.Y.S.2d 367 (Sup. 1988); *People v. Gary M., supra.* Moreover, defense attorneys have every incentive to discriminate in the exercise of peremptory challenges owing to the

States' difficulty in bringing the issue before the courts, and prosecutors face increasing frustration in the face of obvious injustice. Indeed, the judge in the case at bar was bothered by what he saw but was constrained to hold that *Batson* does not apply to defense challenges.

The instant case therefore presents the perfect opportunity for this Court to establish the necessary constitutional foundation and parameters for applying *Batson* to peremptory challenges by defense attorneys. In doing so, the Court will surely promote the cause of equal justice.

Respectfully submitted,

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APPENDIX A

State Provisions for Peremptory Challenges*

AL Ala. Code Section 12-16-100(a) (Michie Repl. 1986)

AK Alaska Stat. Section 09.20.090 (Michie 1983)

AZ 17 A.R.S. Rules Crim.P., Rule 18.4(c) (West 1987)

AR Ark. Stat. Ann. Sections 16-33-303, 304, 305 (Michie 1987)

CA Cal. Penal Code Sections 1069-1070 (West 1985)

CO Colo. Rev. Stat. Ann. Section 16-10-104 (Repl. 1986)

CT Conn. Gen. Stat. Section 54-82g (Rev. 1987)

DL Del. Code Ann. Superior Ct. Rules Crim. P., Rule 24(b) (Michie 1974)

DC D. C. Superior Ct. Rules Crim. P., Rule 24(b) (Michie 1988)

FL F.S.A. Section 913.08 (West 1985)

GA Ga. Code Ann. Section 15-12-165 (1985)

HI Haw. Rev. Stat. Section 635-30 (Repl. 1985)

ID Idaho Code Sections 19-2013, 2015, 2016 (Michie Repl. 1987)

IL Ill. Stat. Ann. ch. 38 Section 115-4(e) (Smith-Hurd Supp. 1988)

IN Ind. Code Ann. Sections 35-37-1-3, 4 (Burns Repl. 1985)

IA Iowa Code Ann. Section 813.2, Rule 17.9 (1987)

KS Kan. Stat. Ann. Section 22-3412 (Ensley Cum.Supp. 1987)

KY Ky. Rev. Stat. Ann. Section 22-3412 (Michie Cum.Supp. 1987)

LA La. Stat. Ann. C.Cr.P. arts. 799, 800 (West Supp. 1988)

ME Me. Rev. Stat. Ann. tit. 15 Section 1258 (West Rev. 1980)

MD Md. Cts. and Jud. Proc. Code Ann. Section 8-301 (Michie Cum.Supp. 1988)

MI Mich. Comp. Laws Ann. Sections 768.12, .13 (West Repl. 1982)

MN Minn. Stat. Ann. Section 546.10 (West Repl. 1988)

MS Miss. Code Ann. Section 99-17-3 (1972)

MO Mo. Stat. Ann. Section 546.180 (1986)

MT Mont. Code Ann. Section 46-16-305 (1987)

NE Neb. Rev. Stat. Section 29-2005 (1985)

NV Nev. Rev. Stat. Section 175.051 (1987)

NH N.H. Rev. Stat. Ann. Sections 606: 3, 4 (Equity Repl. 1986)

NJ N.J. Stat. Ann. Section 2A: 78-7 (West Supp. 1988)

NM N.M. Stat. Ann. Section 38-5-14 (Michie Repl. 1987)

NY N.Y. Laws Cr.P. 270.25 (McKinney's 1982)

NC N.C. Gen. Stat. ch. 15A Section 1217 (Michie 1983)

ND N.D. Cent. Code Ann., Rule Crim.P. 24(b)(1) (Repl. 1975)

OH Ohio Rev. Code Ann. Section 2945.21 (Baldwin's 1986)

OK Okla. Stat. Ann. tit. 22 Section 655 (West 1981)

OR Or. Rev. Stat. Ann. Section 136.230 (Buttorworth Supp. 1984)

PA Pa. Stat. Ann. tit. 42, Rules Crim.P., Rule 1106 (Purdon's Supp. 1988)

RI R.I. Court Rules Ann., Superior Ct. Rules Crim.P., Rule 24(b) (1988-1989)

SC S.C. Code Ann. Section 14-7-1110 (Lawyer's Co-op. Cum.Supp. 1987)

SD S.D. Codified Laws Ann. Section 23A-20-20 (Michie Cum.Supp. 1987)

TN Tenn. Code Ann., Rules Crim.P., Rule 24 (Michie 1988)

TX Vernon's Ann. C.C.P. arts. 35-13, 14, 15 (Supp. 1988)

UT Utah Code Ann. Section 77-35-18, Rule 18 (Allen Smith Repl. 1982)

VA Va. Code Ann. Section 19.2-262 (Michie Repl. 1983)

VT Vt. Stat. Ann. tit. 12 Section 1941 (1973)

WA Wash. Rev. Code Ann. Section 10.49.060 (West 1980)

WV W.Va. Code Section 62-3-3 (Michie Repl. 1984)

WI Wis. Stat. Ann. Section 972.03 (West Repl. 1985)

WY Wyo. Stat. Ann. Section 7-11-103 (Michie Repl. 1987)

* For a general overview of the differences among the states in exercising peremptory challenges, *see* Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images and Procedures*, 64 N.C. L.Rev. 501, 519 n. 104 (1986).

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